Supreme Court, U.S.
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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE CUSTOMER COMPANY,
Petitioner,

vs.

THE CITY OF SACRAMENTO AND
THE COUNTY OF SACRAMENTO,
Respondents,

Petition for Certiorari To The California Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

Whether the holding of the California Supreme Court that the destruction of private property by the police in order to apprehend a criminal suspect is not "taking" and does not require compensation under Article I, Section 19 of the California Constitution violates petitioner's 5th Amendment right of compensation for such a taking.

LIST OF PARTIES

The caption of the case contains the names of all parties.

Petitioner The Customer Company has no parent company or wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Official and Unofficial Reports

Customer Co. v. City of Sacramento
10 Cal. 4th 368; 41 Cal.Rptr. 2d 658; 895 P.2d 900 (June 1995)

Basis of Jurisdiction

Petitioner claims this court has jurisdiction pursuant to 28 U.S.C. §1257 and Supreme Court Rule 10.1 in that the ruling of the California Supreme Court violates petitioner's 5th Amendment rights raising an important issue of federal law which has not been, but which should be, settled by the U. S. Supreme Court.

The California Supreme Court filed its opinion on June 12, 1995. Rehearing was denied on July 13, 1995 and the matter remitted to the Court of Appeal that same day.

1. CONSTITUTIONAL PROVISION IN ISSUE.

AMENDMENT V -- GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

> or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Emphasis added.)

2. STATEMENT OF THE CASE

Sacramento police investigating robberies determined to question a person named Nash. (C.T. 1783:1-225.) On a Friday they broadcast a look-out bulletin for a white Camaro which Nash was reportedly driving, then took off for the weekend. (C.T. 1781:1-24; 1782:1-24; 1796:3-9.) About 8:00 a.m. on Monday a plain-clothes deputy drove his unmarked car by one location where Nash was supposedly staying and saw a man and a woman get into the Camaro. (C.T. 1796:8-25; 1784:1-7.) The deputy radioed his partner and followed the Camaro, intending to make a vehicle stop when he had back-up. (C.T. 1777; 1797:13-18.) The Camaro stopped at petitioner's store "Roger's Food & Liquor" and the occupants entered the store. The deputy waited out of sight for his partner to arrive so they could arrest the Camaro occupants when they came out of the store. (C.T. 1784:8-9; 1799:5-23.) The deputy's partner and additional Sacramento police responded to his call in two unmarked cars and a black and white car. (C.T. 1805:22-

1806:20.) Before they reached the store, the cars pulled to the curb and waited, the black and white apparently some distance behind the unmarked cars. (C.T. 1810:2-13; 1816:24-1817:14.) A covert surveillance was planned until Nash left the store. (C.T. 1777; 1811:16-21.) Then, before Nash had come out of the store, a marked sheriff's car with lights flashing headed towards the store. The black and white followed it closely into the parking lot and stopped by the store's doors. (C.T. 1777; 1817:17-1818:9; 1829:5-26; 1830:25-1831:11.)

Inside, Nash then walked away from the checkout counter toward the rear of the store, saying he wanted to get a soda. The store clerk saw police outside with guns drawn. (C.T. 1835:12-19; 1836:26-1837:19; 1838:15-1839:7.) Police then used a loudspeaker to order everyone out of the store. The clerk and the woman passenger in the Camaro came out of the store, but Nash did not. (C.T. 1838:21-1839-28; 1878:21-23.) The clerk told police that no one other than Nash was in the store; the woman passenger said that Nash's guns were in the Camaro and that Nash was unarmed. (C.T. 1840:16-20; 394; 451; 1082; 2350.) By 8:36 a.m., police had secured the store's perimeter and used a car to block the store's rear doors. (C.T. 1777; 398; 453.) A SWAT team arrived at 9:17 a.m. (C.T. 1778; 1780.) A police sergeant used a loudspeaker for about 10 minutes to tell Nash to "answer the phone" but received no response. (C.T. 1850:5-6; 1882:11-21.) Because 30-40 officers were present and nearby major streets were blocked, police decided to fire tear gas to expedite Nash's removal. (C.T. 1850-1852.) Petitioner asked that tear gas not be used, as the store

and inventory would be contaminated; but the lieutenant in charge just laughed at the request. (C.T. 1644:23-1645:1; 1646:25-1647:2.) Just before tear gas was fired, two guns were found in the Camaro; one was the type Nash reputedly always carried. (C.T. 1779; 1783:14-16.) Between 11:10 a.m and 12:04 p.m. when police ran out of tear gas, at least 13 rounds of tear gas were fired into the store. Mace was then sprayed into attic vents, police entered the store, and at 1:13 p.m. found Nash unarmed, unconscious or feigning sleep in the attic. (C.T. 1779; 1786:1-1789:23; 390; 395; 400.)

The tear gas concentration was so severe that for days employees were able to stay in the store for only a few minutes at a time. (C.T. 1648:18-22; 1649:5-28.) Exterior windows, interior glass doors and the ceiling were damaged or broken by the blasts and the entire store was contaminated. (C.T. 1792.) An environmental pollution expert determined that the entire inventory was "Extremely Hazardous" material under California law. All inventory, except beverages which could be poured down the sewer, was contained, sealed and dumped as hazardous waste at a Class I dump site as required by law, and the store was closed for 11 days for decontamination and repair. (C.T. 1890:1-28; 1891:1-13; 369:35-370:1.) The cost to petitioner to repair the damage caused by the tear gas attack, including the toxic cleanup, containment, dumping, removal, repair and replacement of fixtures, equipment and inventory, but not including lost profits from the store closure, exceeded $275,000. (C.T. 481.)

Petitioner sued in inverse condemnation and other theories, to attempt to recover its costs. The federal constitutional issue was raised by the City of Sacramento in its motion for summary judgment. (C.T. 623.) The trial court granted summary judgment, finding that an "emergency" existed which exempted the City and County from the requirement to compensate petitioner. The Court of Appeal affirmed, holding that the actions of the officers in attempting to subdue and arrest the "barricaded and dangerous suspect" here were taken "under the pressure of public necessity and to avert impending peril," and "We find all the elements of an emergency necessitating tear gas in the present situation." Finding an emergency, the appellate court held that the governmental entities were exempted from the Constitutional requirement that the property owner be compensated.

The California Supreme Court upheld the Court of Appeals stating that the state constitution's protection against takings does not apply to property damage "incidentally caused by the actions of public employees in pursuit of their public duties." 10 Cal.4th 368 at 377-78. The federal question (5th Amendment) was properly placed before the California Supreme Court in the Amicus Curiae brief of The Pacific Legal Foundation. (Appendix, Ex. 3.) The Pacific Legal Foundation also participated in oral argument before the California Supreme Court and raised the 5th Amendment protection in its argument.

3. ARGUMENT

The California Supreme Court's Decision is based on two separate grounds:

1. That the constitutional protection against taking without compensation does not apply to the destruction of private property by the police in pursuit of their public duty (arresting a criminal suspect), and

2. That such a taking would also be allowable under the so-called emergency exception to the Just Compensation Requirement.

Something is wrong here, and that something is that the California Supreme Court has permitted an uncompensated, calculated taking of private property for public good where no immediate harm was threatened to anyone, in violation of Article 1, Section 19 of California's Constitution and the Fifth Amendment.

This court has stated,

> It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar the government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." First English Evangelical Lutheran

> Church of Glendale v. County of Los Angeles. (482 U.S. 304, 312-19 (1987) (quoting Armstrong v. United States 364 U.S. 40,49 (1960)).

The factual situation raised in this case is that the police deliberately intended to, and did, use petitioner's property (a small grocery store) for purposes of containing a criminal suspect and then intentionally destroyed the store to effectuate the suspect's apprehension. The California Supreme Court's holding that this incident does not comprise a compensable taking under the California Constitution violates petitioner's 5th Amendment Rights against taking without compensation. At least two other states (with similar state constitutional provisions) have held that damages to private property effected by the police in the course of their routine activity does constitute a compensable taking (Wegner v. Milwaukee Mut. Ins. Co. (Minn. 1991) 479 N.W.2d 38; Steele v. City of Houston (Tex. 1980) 603 S.W.2d 786). This court has further determined that "the 'public use' requirement is ... coterminous with the scope of a sovereign's police powers." Hawaii Housing Authority v. Midkiff 467 U.S. 229 (1984). This court even went so far as to say that such actions need only be "rationally related to a conceivable public purpose" to pass muster under the Public Use Clause. Id., at 241. The intentional destruction of a private citizen's property to effectuate a governmental objective (such as arresting a criminal suspect) is exactly what the 5th Amendment was designed to guarantee compensation for.

Regarding the "emergency" exception to just compensation, if there is to be an emergency exception, it is an unwarranted extension of that exception to apply it where there is no immediate danger to persons or an overwhelming necessity to act immediately to protect property. The 5th Amendment and the California Constitution both provide that private property shall not be taken for public good without compensation. There was no emergency in this instance; the immediate apprehension of the suspect was not imperative to prevent imminent harm; the only emergency aspect of the situation arose from the attempt to arrest a person who was at the time threatening no one, and the immediacy arose not from a fear of immediate harm but from a desire to free the 30 to 40 officers who were tied up in the attempted arrest. Under the California Supreme Court decision, an emergency exists any time an arrest is attempted on a person who may resist arrest (even though he is, as in the present case, unarmed). No consideration is given to the fact that there were alternatives which would have saved the private owner's property but resulted in greater cost to government: wait it out and arrest him when he comes out, or continue to try to conduct meaningful negotiations with the suspect, or simply leave and try to arrest him at some later time when the arrest can be accomplished without vast destruction of property.

The California Supreme Court has determined that a small store is worth sacrificing without compensating the owner, to accomplish an arrest; but under the court's decision, the result would have been the same if the suspect had been in Walmart, Safeway, the Empire State Building or someone's home. Has

our system of justice come to this, that the police can ignore the effect on private property to accomplish an arrest, because government does not have to pay for it and it is therefore cheaper to bomb a property with tear gas than to defer the arrest to a later time?

Through no fault of the petitioner, a suspect happens to be on his property as a customer when the police decide to arrest him, they blow their cover by flashing their lights to notify the suspect he is in trouble, and then they blow up the petitioner's store to effect the arrest immediately because it would be too expensive to wait until it could be effected later. Can the police blow up your home without compensating you, to effect an arrest, even when the person arrested is at the time threatening no one and his only connection to you is that he happens to be on your property at the time? If a decision is made that the arrest is important enough to justify the destruction of private property, then is it fair to allocate the entire risk of loss to an innocent property owner for the good of the public? And is it consistent with petitioner's rights as Americans under the 5th Amendment? We think not. The constitutional protections requiring compensation for takings deserve more than the lip service provided them by the California Supreme Court.

It is a fundamental violation of the 5th Amendment to allow the uncompensated destruction of property to achieve a governmental end.

Dated: December, 1995

Respectfully submitted,

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